

Overview of Canadian Class Action Systems

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Class actions were first introduced in Canada in 1978, when the province of Quebec (a mixed common law and civil law jurisdiction) amended its *Code of Civil Procedure* to allow for representative claims.¹ It took the enactment of the *Class Proceedings Act, 1992* in Ontario, however, for class actions to take root in the rest of Canada.² To date, all but one of the remaining eight provinces has passed class action legislation, as has the Federal Court, which has subject-matter jurisdiction over matters within the powers of the federal government. It is not precisely known how many class actions have been litigated in Canada since their inception, since the only central repository is incomplete,³ but the Law Commission of Ontario reported that approximately 1500 cases had been started in Ontario between 1993 and early 2018,⁴ while Professor Piché's Class Action Lab estimates that 1306 cases were filed in Québec in the same time period.⁵

Like the United States' Federal Rule 23, which inspired the Canadian regime, class actions must be certified by a judge according to a set of criteria that focus on the commonality of legal and factual issues among class members, the suitability of the proposed representative, and the manageability of the action, including by comparison to alternatives.⁶ The certification tests in each Canadian province vary somewhat one from the other, but are universally considered to be less onerous than current judicial approaches in the United States to Rule 23 certification. Amendments to Ontario's statute in 2020, however, incorporate the predominance test verbatim from Federal Rule 23, and are

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¹ *Code of Civil Procedure*, RSQ c C-25.01, Book VI, art. 571-604.

² *Class Proceedings Act, 1992*, SO 1992, c-6 ["CPA"].

³ For many years, lawyers were encouraged, but not obligated to file new statements of claim on the Canadian Bar Association Class Action Database (<https://www.cba.org/Publications-Resources/Class-Action-Database>). Some lawyers refused to do so for fear that copycat lawsuits would be filed. Notifying the Database about new filings is now mandatory in some jurisdictions, but compliance is not enforced.

⁴ Law Commission of Ontario, *Class Actions: Objectives, Experiences and Reforms Final Report* (July 2019) at 14.

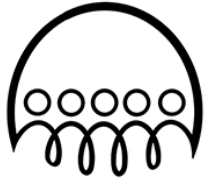
⁵ Catherine Piché, *Class Actions in Quebec: First Empirical Report of the Class Actions Lab* (May 2018) at 19.

⁶ CPA, s. 5(1).

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expected to make certification of class actions in that province more difficult than in the rest of the country.⁷

Canadian class actions are horizontal (trans-substantive), opt out, and subject to close judicial supervision. They allow representative plaintiffs to sue for damages on behalf of the class, in addition to non-monetary relief, but unlike U.S. Rule 23(b)(3), there is no special treatment for 'damages' class actions. As in the United States, Canadian courts acknowledge that class members are largely absent in representative proceedings, but permit class members to participate by objecting to proposed settlements. There is no culture of 'professional' objectors or of a specialized bar to represent objecting class members, as there is said to be in the United States. It is rare for a proposed settlement to be rejected at the approval hearing, though judges have commented that it is not a 'rubber stamp' exercise.⁸

The financing of class actions in Canada is a unique mix of lawyers working on contingency fees, commercial litigation funding and, in the two most active Canadian jurisdictions, not-for-profit litigation funding.⁹ In recent years, commercial litigation funding has become more common, though still not nearly as popular as it is in Australia.¹⁰ Half of the Canadian provinces have cost-shifting rules for class actions, as is universally the case in all civil litigation in Canada, while the other half uniquely employ the American costs rule in class

⁷ CPA, s. 5(1.1).

⁸ *Leslie v Agnico-Eagle Mines*, 2016 ONSC 532 at para. 11.

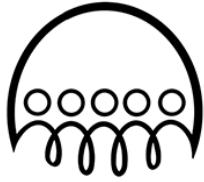
⁹ The Class Proceedings Fund in Ontario was created by statute at the same time class proceedings legislation was passed. A five-member Committee selected by the Attorney-General and Law Foundation of Ontario is required pursuant to section 5 of Ontario Regulation 771/92 to consider applications to the Fund and make a determination whether to fund a class action on the basis of three primary considerations: the extent to which the issues in the proceeding affect the public interest; the likelihood that the action will be certified; and the financial status of the Fund. In return for funding disbursements and an indemnity against adverse costs awards, the Fund receives a 10% levy on successful applicants' settlement or judgment awards. For a description of the Class Proceedings Fund, see <https://lawfoundation.on.ca/for-lawyers-and-paralegals/class-proceedings-fund/>. For a description of the comparable Quebec fund, les Fonds d'aide aux actions collectives, see <http://www.faac.justice.gouv.qc.ca/>.

¹⁰ For a comparative discussion of litigation funding of class actions in Canada and Australia, see Jasminka Kalajdzic, Peter Cashman, and Alana Longmoore, "Justice for Profit: A Comparative Analysis of Australian, Canadian and U.S. Third Party Litigation Funding" 61:2 *American Journal of Comparative Law* (2013).

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actions only.¹¹ The question of costs has become controversial, especially in Ontario where adverse costs awards in the hundreds of thousands of dollars have become the norm.¹²

Canada does not have a procedure akin to the U.S. multi-district litigation proceeding; if multiple class action complaints are filed arising out of the same matter, counsel may move the court to appoint a single firm to “carry” the litigation. Nation-wide classes may be certified in a single class action in one province, or several class actions proposing to represent only the residents of their respective provinces can proceed in parallel, with or without the cooperation of counsel.

¹¹ Under the ‘American Rule’, the parties bear their own legal costs, while in jurisdictions with cost-shifting or ‘English Rule’, the successful party is entitled to reimbursement of a significant portion of their legal fees and disbursements from the unsuccessful party.

¹² The Law Commission of Ontario concluded a two-year study of class actions in July 2019, and recommended that the province adopt a no-costs rule for the certification motion, on the basis that the risk of adverse costs had become a barrier to justice for public interest litigants. LCO, CLASS ACTIONS REPORT (July 2019), online: <https://www.lco-cdo.org/wp-content/uploads/2019/07/LCO-Class-Actions-Report-FINAL-July-17-2019.pdf>. The Attorney General of Ontario did not accept this recommendation and no changes to the costs rule were included in the amendments to the CPA in 2020.